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## Legal Scholarship, Legal Realism and the Law Teacher's Intellectual Schizophrenia

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## **Abstract**

I take as my text two statements, one made by a jurist late in the nineteenth century and the other by a law professor two years ago.

**KEYWORDS:** schizophrenia, legal, teacher

# Legal Scholarship, Legal Realism and the Law Teacher's Intellectual Schizophrenia\*

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I take as my text two statements, one made by a jurist late in the nineteenth century and the other by a law professor twenty years ago. The first is Justice Holmes' prediction that "[f]or the rational study of the law, the black letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."<sup>1</sup> The second is by Professor Thomas F. Bergin, a member of the law faculty at the University of Virginia, that "the modern law teacher has been suffering from a kind of intellectual schizophrenia for the past twenty-five years — a schizophrenia which has him devoutly believing that he can be, at one and the same time, an authentic academic and a trainer of Hessians." Bergin explained that "by Hessian training" he meant "training for the private practice at the Bar."<sup>2</sup>

## I. Scholarship's Realist Legacy<sup>3</sup>

Holmes' 1897 call for resort to statistics and economics was a reaction against the dominant attitude toward law that existed in America in the late nineteenth century. Lon Fuller has termed that attitude the doctrinal approach which he described as follows:

The doctrinal method (which has also been described as "conceptualism" and "formalism") does not consider that it is the primary function of judges or legal scholars to weigh the practical conse-

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\* These remarks were prepared for delivery to the faculty of the Nova University Center for the Study of Law, Fort Lauderdale, Florida, April 9, 1988. They have been slightly edited for publication. The reader should bear in mind that the refinements and qualifications appropriate for a formal paper are often not included.

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1. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

2. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 638 (1968).

3. The reader should be warned that in preparing this paper I have borrowed heavily — sometimes verbatim — from my Mason S. Ladd Lecture, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063 (1986).



quences of deciding a particular case one way or the other. Rather, it regards them as having a purely deductive function. The starting point for the decision of any case is to be found in certain premises dictated by the nature of law and legal relations. Each relationship or transaction has its "essential nature." An offer is "by its nature" revocable; a chose in action is "by its nature" unassignable; a contract "of necessity" requires "a meeting of the minds." Basic premises like these are the ultimate entities of the law from which all particular legal determinations flow. Where they appear in combination, the lawyer's task is to analyze the case into these basic elements, and then to deduce from them the decision of the controversy, just as the physicist or chemist might deduce the qualities of a substance from its molecular structure. This is the legal method Holmes had in mind when he said. . . : "I sometimes tell students that the law schools pursue an inspirational combined with a logical method, that is, the postulates are taken for granted upon authority without inquiry into their worth, and then logic is used as the only tool to develop the results."<sup>4</sup>

During the early decades of the twentieth century, other observers joined Holmes in criticizing the conceptual approach. These were the legal realists who were less a single, united school than an eclectic group that agreed on certain criticisms of the legal system.

The realists' message was twofold. First, judicial decisions were not the result of a purely logical process and they were not value free. Instead, judges made, rather than found, law; and in making law they were significantly affected by their socio-economic status and even, so it was said on occasion, by their early morning gastronomical intake. Coupled with this skepticism, possibly cynicism, concerning the logical or doctrinal element of the law was the realists' conviction that since law was purposive rather than self-contained, lawmaking and law study should seek aid from the related social sciences and should investigate the law in action rather than be content with a vision of the law in the books. Both of these realist perceptions have present day consequences for legal scholarship.

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4. L. FULLER, BASIC CONTRACT LAW 520-21 (1947), quoting O. HOLMES, COLLECTED LEGAL PAPERS 210, 238 (1920). See also Holmes, *supra* note 1, at 468 and 185:

We are only at the beginning of a philosophical reaction, and of a reconsideration of the worth of doctrines which for the most part still are taken for granted without any deliberate, conscious and systematic questioning of their grounds.



## A. Rejection of Conceptualism

Although the conceptual approach was the dominant spirit of the law and legal education in the late nineteenth and early twentieth centuries, contemporary law teachers know that law and law study are not solely or even predominantly self-contained exercises in Euclidean logic. The fighting issue today is not whether judges and administrators make, rather than find, law or whether in particular cases judges have a rather broad range of choice. The issue, instead, is the extent of that range, which raises difficult questions concerning the appropriate role of the judiciary in our democratic, representative, constitutional system of government, including: What are the respective responsibilities of the judiciary and the legislature? What is the role of the judiciary versus the roles of private autonomy and the market as the arbiters of social conflict? What is the appropriate responsibility of the federal judiciary in imposing federal solutions on state institutions that make and apply law?

These are difficult questions whose resolution will depend on many variables and concerning which legal scholars will sharply disagree. But one proposition upon which the overwhelming majority of American law teachers does agree is the realist tenet that answers to difficult legal questions are not to be found in the formalist conceptualism of the late nineteenth and early twentieth centuries. To this extent the realist movement is transcendently and universally triumphant.

This abandonment of the formalist conception of law has obvious implications for the law teacher's scholarship role. For if unadorned deductive reasoning from conceptual premises no longer can be relied upon to yield answers to difficult legal problems, the scholar who seeks answers must find succor elsewhere — in other, sometimes overlapping, schools of legal thought and modes of reasoning and analysis that have episodically competed for supremacy during the last half century, including (1) the "policy science" proposal advanced by Myres McDougal and Harold Laswell;<sup>5</sup> (2) the legal process, reasoned elaboration approach of Henry Hart, Albert Sacks and Lon Fuller;<sup>6</sup> (3) instrumental-

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5. Laswell & McDougal, *Legal Education and Public Policy Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943); McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 YALE L.J. 1345 (1947).

For a discussion of the Laswell-McDougal proposal, see *A Symposium in Honor of Hardy C. Dillard*, 54 VA. L. REV. 583 (1968).

6. H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING*



ism — the idea that law is or should be basically pragmatic, that is, the law should be used in a practical way to solve practical problems and achieve social ends;<sup>7</sup> (4) utilization of the methods of economic analysis to illuminate and resolve legal issues and problems;<sup>8</sup> (5) the “rights thesis,” most commonly associated with Ronald Dworkin and embraced by other legal scholars;<sup>9</sup> (6) the approaches of the members of that diverse group known as the Conference on Critical Legal Studies who share “a common disenchantment with liberal legalism;”<sup>10</sup> (7) feminist

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AND APPLICATION OF LAW (TEMP. ED. 1958); L. FULLER, *THE MORALITY OF LAW* (1969); *THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER* (K. Winston ed. 1981).

See also A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); J. ELY, *DEMOCRACY AND DISTRUST* (1980); J. Vetter, *Postwar Legal Scholarship on Judicial Decision Making*, 33 J. LEGAL EDUC. 412 (1983).

7. See R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982).

8. See G. CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); M. POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* (1983); R. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986).

9. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 2 (1977); R. DWORKIN, *LAW'S EMPIRE* (1986).

In Dworkin's world of principle, one commentator has said, “there is always a single right answer.” Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity and the Linear Order of Decisions*, 72 CALIF. L. REV. 369, 379 (1984).

In his insightful history of American legal education from the 1850's to the 1980's, Robert Stevens discussed Dworkin's role as follows:

Dworkin's . . . general approach was to appear to argue that doctrine was all. If rules were not available to decide cases, then some underlying principle was available. Because this approach might well be thought to be even narrower than the formalistic English tradition (or, conversely, savoring of some concept of fundamental or natural law), its arguments might have been expected to be greeted with skepticism by a generation bred on Realist suppositions and prejudices. Nothing could give greater evidence of the change that had come over American law in the 1970s and particularly its search for a new form of faith, than the fact that Dworkin became an important cult-figure. His rule-principle dichotomy influenced leading scholars, and *TAKING RIGHTS SERIOUSLY* took over as the most widely discussed book in the typical jurisprudence course. Although it is arguable that Dworkin attracted few “disciples,” his obvious importance and his willingness to link legal philosophy more clearly with a revived political philosophy underlined the rebirth of neoconceptualism and further underlined the coming of the new age of faith.

R. STEVENS, *LAW SCHOOLS: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 274 (1983).

10. Gordon, *New Developments in Legal Theory*, in *POLITICS AND LAW: A PRO-*



legal theory;<sup>11</sup> and (8) literary theory.<sup>12</sup>

The obvious relevance of these various schools of legal thought and analysis to the law teacher's scholarly research role is that a teacher's embrace of any one of these approaches very likely will determine her research agenda and methodology. What is not so obvious are the transaction and opportunity costs that are involved in making the initial choice of a favored approach and in maintaining current awareness of developments and changes in the approach.

Of perhaps greater importance, as the competing models change over time and as new schools of thought emerge, the responsible scholar feels an obligation to become informed concerning those developments. Again, there can be major transaction and opportunity costs that must be borne by the scholar. Consider, if you will, the time and energy required to follow the torrent of words from and about critical legal scholars, or the burgeoning feminist and literary theory literature. Nor should one forget Posner's third edition of *Economic Analysis of Law* (1986), a 640 page tome in the preface of which he observes that since publication of the first edition in 1973, there have been published "a number of edited books of readings . . .; two textbooks . . .; and a law-and-economics casebook."<sup>13</sup> And since Posner wrote, my colleague, Steven Shavell, has added a 300-page volume titled *Economic Analysis of Accident Law* (1987).

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GRESSIVE CRITIQUE 281, 283 (D. Kairys ed. 1982).

See also M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); Hutchinson & Monahan, *Law, Politics and the Critical Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 209 n. 43 (1984) ("The critical scholars indiscriminately use the term 'liberalism' to refer to any ideas outside the broad range of Marxism and critical scholarship. For example, CLSers would characterize Rawls, Nozick, Dworkin and Posner all as liberals."); Levinson, *Escaping Liberalism: Easier Said Than Done*, 96 HARV. L. REV. 1466, 1468 (1983) ("What joins the various contributors [to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982)] . . . often appears to be principally a deep hostility to liberal legalism and the capitalistic economic and social structure with which liberal legalism is associated."); Byse, *supra* note 3, at 1081-85 (attempting a "tentative or provisional synthesis" of critical legal studies views).

11. See Sunstein, *Feminism and Legal Theory*, *Review of Catherine A. MacKinnon, Feminism Unmodified*, 101 HARV. L. REV. 826 (1988).

12. See *Introduction: Interpretation Symposium*, 58 S. CAL. L. REV. 1 (1985); Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982). For a brief, thoughtful and highly readable discussion of the literary theory movement, critical legal studies and law and economics, see Minow, *Law Turning Outward*, 73 TELOS 79 (Fall 1987).

13. R. POSNER, *supra*, note 8, at xix.



Obviously unable to master all of these approaches, how is the legal scholar to choose which to follow? What approach or approaches to law will the scholar select to be the basis of her scholarship? How much time and energy will she devote to maintaining a current awareness of developments and changes in that and other schools of legal thought and to the emergence of new and different visions of the legal landscape?

## B. Legal Scholarship and the Related Disciplines

As perplexing as these questions are, there is greater difficulty in resolving a second set of problems that also are a legacy of the realist tradition. In this instance, the problems have not arisen from the realist demolition of conceptualism and the resulting vacuum which the various schools of legal thought have sought to fill, but from the other realist perception that the methods, theories and subject matters of the social sciences can contribute to an informed understanding of the legal system. As might be expected, in a group as diverse as the 4500 American law teachers, those who embrace this view do so with varying degrees of intensity. One group that apparently finds this approach attractive are the members of the Law and Society Association established in 1964 as an interdisciplinary association of persons in law and the social sciences. The Association publishes the *Law and Society Review* four times a year. It meets annually and has approximately 1200 members, of whom about one-fourth to one-third are law professors.

Much valuable work has been done by legal scholars who have departed the Library and who alone, or with the aid of persons trained in other disciplines, have explored the actual operation of particular legal rule or institutions.<sup>14</sup> Some measure of the rate of progress in

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14. See, e.g., A. CONARD & J. MORGAN, *AUTOMOBILE ACCIDENTS AND PAYMENTS* (1964); H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966); Bezanson, Cranberg & Soloski, *Libel Law and the Press: Setting the Record Straight*, 71 IOWA L. REV. 215 (1985); Baldus, Woodward & Pulaski, *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 U. CAL. DAVIS. L. REV. 1375 (1985); Macauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

See also Trubek, *A Strategy for Legal Studies: Getting Bok to Work*, 33 J. LEGAL EDUC. 586, 589-90 (1983), discussing the question: "What Has Legal Studies Accomplished?"; Dawson, *Legal Realism and Legal Scholarship*, 33 J. LEGAL EDUC. 406, 408-11 (1983).



empirical and interdisciplinary research may be suggested by noting the appraisals of two informed observers. Writing in 1968, the first observer, Harry Kalven, Jr., stated that although the "relevant" bookshelf of "book-length legal studies with an empirical bent [is] still well under five feet, . . . [t]here has been nothing like them previously, and their existence marks a major change in the relationship of law and science."<sup>15</sup> In 1984 the editor of the *Law and Society Review*, Richard O. Lempert, noted that "law and social science research has blossomed during the past fifteen years. Today when I look around my office, I see eleven relevant bookshelves, which is only a small fraction of what has been produced."<sup>16</sup> Were Professor Lempert to look today, I am sure he would see even more.<sup>17</sup>

Taken as a whole, the realists' emphasis on utilizing social science methods and insights has been moderately successful. But much remains to be done and as Professor David M. Trubek, one of the foremost scholars of the interdisciplinary and empirical approach, has observed, "[i]f we want to expand legal studies<sup>18</sup> in America, we have to do two things. First, we have to have institutions that consider this kind of work their primary mission. Second, these institutions must have adequate financial support."<sup>19</sup> I do not pursue these aspects of interdisciplinary and empirical scholarship in this paper because the focus of my remarks on this occasion is the dilemma and problem of choice of the *individual* law teacher, not the broader institutional, structural and fi-

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15. Kalven, *The Quest for the Middle Range: Empirical Inquiry and Legal Theory*, in *LAW IN A CHANGING AMERICA* 56-57 (G. Hazard ed. 1968).

16. Lempert, *Law and Society: Its Research*, 15 *Syllabus* 3 (1984).

17. See, e.g., R. LEMPERT & J. SANDERS, *AN INVITATION TO LAW AND SOCIAL SCIENCE: DESERT, DISPUTES, AND DESTRUCTION* (1986); L. LIPSON & S. WHEELER, *LAW AND THE SOCIAL SCIENCES* (1986); J. MONAHAN, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* (1985).

18. Defined by Trubek as "a more interdisciplinary approach to, and more empirical investigations of, the law." Trubek, *supra* note 14, at 586.

19. *Id.* at 591.

See the interesting suggestion of Professor Alfred F. Conard that "[e]ventually we may see a type of institution emerge alongside the law school, just as schools of public health arose alongside medical schools. These schools might conduct instruction and research on the delivery of legal services (as public health schools deal with hospital administration and health insurance), and on the diffuse causes and consequences of litigation (as public health schools deal with epidemiology). Institutions of this sort might dub themselves schools of 'justice,' having a relation to 'law' somewhat like that of 'health' to medicine." Conard, *The Law School's Responsibility for the Quantity of Justice*, 33 *J. LEGAL EDUC.* 600, 603 (1983).



nancial problems confronting the law school, the university or the larger society of which the individual is a part. Thus I ask specifically to what extent, if at all, should each of us in pursuing our scholarly agenda endeavor to become informed concerning, and make use of, empirical research and the methods, theories and subject matters of the social sciences?

On the surface, to put the question is to provide the answer: of course, legal scholarship should explore legal problems in context and should utilize allied fields of knowledge, for law is a means of achieving society's objectives. As those objectives or social conditions change, the law perforce also must change; in addition, as a rational system of social control the legal system must consider whether it is achieving its stated objectives and at what cost. From this standpoint, the legal scholar who confined law scholarship to the law library would be irresponsible. Why is it, then, that in performing legal scholarship many American law teachers primarily or exclusively direct their attention to legal materials — judicial decisions and opinions, legislation, administration, regulations and the like?

One possible answer is tradition. In yesteryear, our respected forebears were library researchers;<sup>20</sup> it is rational that many of us sought to emulate them. Another reason for focusing on legal materials is our background and profession: we went to law school; we were trained to become lawyers; we are lawyers; we teach law. It is natural and logical that initially, at least, our scholarly concerns would be those that relate to topics with which we are familiar and concerning which we have some competence; that is, those problems that are uniquely legal. Similarly, the materials of legal research are more easily identified and more readily available for study and analysis than the more esoteric data of the related social sciences; and the law's reasoning processes — "analogy, discrimination and deduction —"<sup>21</sup> are more congenial to us than the more recondite social sciences methodologies. In addition, law teachers often lack sufficient expertise to appraise the work of social scientists or to make informed judgments when, as often is the case, experts in the field reach conflicting conclusions. Also, by the time the cognoscenti in a discipline have reached a consensus on which the law scholar might build, new knowledge at the frontiers of the discipline

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20. See Dawson, *supra* note 14, at 409: "[O]n the whole my generation of law teachers adhered closely to the books . . . . Our duty was clear and cheerfully accepted — to write for the law reviews."

21. Holmes, *supra* note 1, at 465.



may be undermining the consensus and thus the reliability of the law teacher's interdisciplinary conclusions.

Perhaps more important than any of these reasons for the reluctance of law teachers to invest heavily in interdisciplinary and empirical endeavors are limitations of time and energy. As our society has become more complicated and interdependent, the law has increasingly intervened in areas that theretofore were relatively free of legal constraints. Because of this burgeoning of common, legislative and administrative law and of the increase in the country's population and economic activity there has been a massive increase in the materials of traditional legal research. As a result, a contemporary legal scholar must devote more and more of her necessarily limited store of time to the task of monitoring current developments in her field of expertise,<sup>22</sup> not only studying primary sources — judicial opinions, statutes, administrative decisions and regulations — but also perusing the seemingly endless cascade of secondary commentary. Maintaining current awareness of the literature in the related discipline also imposes significant transaction and opportunity costs on the conscientious legal scholar.

In light of all these costs and constraints, it is understandable that except for those who have earned graduate degrees or have engaged in graduate work in nonlaw subject matters, American law teachers in the main have not embraced the methodologies and materials of the social sciences.

Here again the realist legacy requires the legal scholar to grapple with another set of questions: Should precious time and energy be invested in seeking enlightenment from the subject matters and methodologies of the related social science disciplines? If, as is likely, the answer is yes, the more difficult next questions are, how heavy should the investment be and in what disciplines should it be made? Should the law teacher select a particular related discipline, say economics or psychology or political science, and devote her energies to that single field? Or should she be more eclectic and endeavor to become informed con-

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22. Unless the scholar shares the attitude of a younger colleague of Professor Francis A. Allen. Allen reports the following incident: "A few years ago, coming to the end of a rather extended piece of work, I discovered to my surprise that in the course of research I had read upwards of two thousand recent state and federal criminal appeals. At coffee the next day I mentioned the statistic to a group of my colleagues. A stunned silence followed. Finally, a younger colleague said: 'But weren't you afraid it would rot your mind?' " Allen, *The Dolphin and the Peasant: Ill-Tempered, but Brief, Comments on Legal Scholarship*, PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN E. CRIBBET 187 (P. Hay and M.H. Hoeflich eds. 1988).



cerning a number of non-law disciplines, including perhaps such subject matters as structuralism, public choice theory, semiotics, sociobiology, phenomenology and so on? Should she engage in field research and on what scale? Should she do so alone or in collaboration with a social science colleague?

## II. The Law Teacher's Intellectual Schizophrenia

Of equal relevance to the realist legacy in explaining the failure of the typical legal scholar to engage in significant interdisciplinary scholarship is the law teacher's intellectual schizophrenia diagnosed by Professor Bergin that I referred to at the outset of these remarks. Bergin describes the deleterious consequences of this disease as follows:

By compelling true academics, or those who have the potential for serious scholarship, to play out a Hessian-trainer role, and by compelling highly skilled Hessian-trainers to make believe they are legal scholars, the disease dilutes both scholarship and Hessian training to the advantage of neither. That this compulsion (I am using the word in as many senses as I lawfully may) exists in today's law schools seems to me plain upon inspection; for there is no fact more visible in our law schools than that teachers with extraordinary scholarly skills are being made to "pay for their keep" by rule preaching and case parsing. The time they must give over to preparation for their Hessian-trainer roles makes it literally impossible to produce serious works of scholarship. The result is that we have so little authentic scholarship in our law schools that we are lucky not to be driven out of the academic herd.

Almost as serious is the effect of this compulsion on the solid non-scholar Hessian-trainers. Since they are in a university environment (and not the Practicing Law Institute), and since the term "scholarship" in a university environment is affectively connotative of "the good," it is not surprising that the non-scholars are as diluted by their painful attempts to produce works of scholarship as the scholars are by their attempts to teach their students how to be lawyers. As proof of the proposition that non-scholars are driven to produce vast tonnages of trivia each year in the name of scholarship, I refer the reader to that Forest Lawn of catalogues, the Index to Legal Periodicals.<sup>23</sup>

Although I believe that Bergin overstates the case, there are others



who share his gloomy assessment of the state of American legal scholarship. A good example is Professor John Henry Schlegel's review of two 1983 studies of, respectively, American and Canadian legal education<sup>24</sup> in which Schlegel asserts that "on both sides of the border legal scholarship is low in volume, narrow in scope; spread evenly across the map with variations only in topicality; largely doctrinal; deficient in empirical, historical, and theoretical dimensions; and unbelievably boring."<sup>25</sup> Schlegel also inveighs against the "awful" condition of American legal academics and their scholarship,<sup>26</sup> the "terrible excuses that pass for scholarship,"<sup>27</sup> and the "piteously low" state of American legal scholarship.<sup>28</sup>

My appraisal of the condition of legal scholarship is more muted than the judgments of Bergin and Schlegel. In my opinion, although the state of legal scholarship may be "awful" in a few institutions, in many others the patient is doing very well. I do believe, however, that Bergin's intellectual schizophrenia point is central to an intelligent consideration of the law teacher's responsibility for scholarship. Many legal academics aspire to emulate the scholarly roles of their social scientist colleagues in graduate arts and sciences departments, and unquestionably, American legal education is moving in that direction.

But one may doubt that the great majority of American legal academics — even if they wished to do so — will soon, if ever, be able to realize that aspiration. This is so because the training or teaching mission of law schools is different from the training or teaching mission of the social science graduate departments. Our students come to us, for the most part, to be educated to become practicing lawyers — how to represent clients whether the client be a human being, a business entity, a government instrumentality or a "public interest" group. So long as we accept our students' tuition money and our certificate of proficiency is a pre-condition to becoming a member of the practicing bar, we have a responsibility to train our students. But that responsibility does not include teaching them to be scholars. Accordingly, when we teach our law classes, there is little scholarly synergy between student and teacher. We "do not receive feedback from students, [we] find it

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24. Schlegel, *Langdell's Legacy, Or, the Case of the Empty Envelope*, 36 STAN. L. REV. 1517 (1984).

25. *Id.* at 1527.

26. *Id.* at 1519.

27. *Id.*

28. *Id.*



difficult to integrate [our] teaching and research activities, and [we] do not have at [our] disposal a corps of apprentices, corresponding to Ph.D. candidates in other fields, to extend [our] research."<sup>29</sup>

Students in social science graduate departments go to graduate school to learn to become scholars, to learn to do the very same things that their mentor-teachers are doing. There is thus a community of purpose in a social science graduate department: to do, and/or to learn how to do, research and scholarship.<sup>30</sup> In law schools, this community of scholarly purpose does not exist.

Coupled with the negative costs of this lack of common purpose in furthering research is the law teacher's affirmative duty to help his students to acquire "an understanding of some substantive body of law, a familiarity with the basic rules of, say, contract law or civil procedure or bankruptcy" and also "— most obviously in the first year, but in upper level courses as well — to assist his students in developing the skills of argument and analysis that they will require as lawyers."<sup>31</sup>

We law teachers thus are confronted with a third pervasive problem of legal scholarship: how can we be faithful to our teaching responsibilities and at the same time realize our aspiration to engage in worthwhile scholarship?

### III. An Attempt At Some Answers

What I have presented thus far is, I suggest, quite consistent with the law teacher's craft: historical and contextual background has been provided and problems and tensions have been identified. In a classroom setting, the next step might well be to utter that all-important, recurring question: "What do you think, and why?" But in this assembly, I assume that before I can solicit your reactions I am obliged to

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29. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1121 (1981).

30. Although social scientists sometimes teach undergraduate courses, as Judge Posner has observed, they "tend to view teaching either as an adjunct to their research or as the price they pay for being given time in which to do research. They are rarely heard to discuss their teaching, whereas teaching is a staple of conversation among doctrinal analysts." *Id.* at 1123.

31. Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 YALE L.J. 955, 958 (1981).

Although I do not address the topic in these remarks, another restraint on scholarly endeavors that should be mentioned is the public service or pro bono activity of



state, in rudimentary form at least, how I think one might endeavor to resolve the problems I have described: (1) What mode or modes of legal reasoning should one pursue? (2) To what extent and how should one utilize the related social sciences? (3) How should one respond to Bergin's disease, that is to the tension between training students and pursuing scholarship?

Before specifically addressing these three questions, the following prefatory comments are in order.

First, since the answers to the questions will have such a major effect on the professional life of the individual concerned, each of us should address these issues in a deliberate, sustained and conscientious manner. The alternative is to resolve them not by reasoned decision making but by sloth, indolence and evasion.

Second, the individual law teacher who confronts these problems should constantly bear in mind that resolving them is an intensely personal matter. This means that the teacher's individual interests, background and values rather than the current zeitgeist should govern the decision. This is not to say that the teacher will be unaffected by contemporary intellectual, moral and cultural standards in academe or the broader society. It is to stress that the individual teacher should maintain an independent stance and not conform her judgment to the dictates of a particular approach, movement or constituency. I recall a question put to me several years ago by a young, untenured colleague who obviously was very worried, "Here I am," she said, "in this faculty that is composed in part of two groups who are in fundamental conflict on so many issues including the issue of what is good scholarship. What am I to do? What kind of article should I write for my tenure piece?" My answer was, "I think I understand why the issue causes you such concern but, really, I believe there is only one answer to the question and that is that you should select the topic and write the article that represents *your* values, *your* vision of the scholarly world *you* have chosen as *your* life's work." I am happy to report that the young scholar is presently a highly-respected, productive member of the law faculty in question. The nub of all this, of course, is simply, "to thine own self be true."<sup>32</sup>

Third, related to my second point that the individual scholar should feel free to reach independent judgments concerning career de-

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32. W. SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK* Act I scene 3 (1623).

See Soifer, *MuSings*, 37 J. Legal Educ. 20 (1987).



cisions is the correlative proposition that all members of the community — the traditionalists, the philosophers, the theoreticians, the clinicians, the empiricists, the economists and other social scientists, and so on — I repeat, all members, should strive to understand and to be tolerant of the divergent approaches of others.

### A. Selection of Mode or Modes of Legal Reasoning and Analysis

All law teachers will necessarily have made some choice of approach toward law at or before their entrance into the professorate. If their legal education and beginning years in practice or teaching occurred before the nineteen seventies, chances are that in addition to rejecting the extreme conceptualism so vigorously criticized by the realists, the bulk of these teachers will have been influenced by the legal process school of legal thought, will tend to engage in instrumental policy balancing and in the main will confine their analysis to legal materials. Their interests tend to relate to problems that confront lawyers and judges in their offices and courtrooms. At the risk of over-simplification, we may denominate these teachers as contemporary traditionalists. This does not imply a narrow, Grub Street view of the law, but it does suggest that these teachers direct their attention to traditional legal materials supplemented by references to philosophical and historical sources.

Later generations of law teachers tend to view law in broader perspective. Although many, perhaps most, of the newer breed of law teachers do not completely reject the traditional approach, they place a much greater emphasis on learning and concepts drawn from many other fields, in particular economics. Their research is likely to be more theoretical than that of the contemporary traditionalists and their writings, sometimes expressed in singularly abstract prose, often appear to be designed to persuade their fellow academics rather than to enlighten the bench and bar. This does not mean that these more academically oriented law teachers do not influence the development of the law. The fact is that they do, as Professor Harry H. Wellington has recently pointed out.<sup>33</sup> But they do so in a markedly different voice from that

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33. Wellington, *Challenges to Legal Education: The "Two Cultures" Phenomenon*, 37 J. LEGAL EDUC. 327, 328 (1987):

[C]onsider the influence of . . . law and economics scholarship on antitrust 14  
<https://nsuworks.nova.edu/nlr/vol13/iss1/3>  
the influence it is beginning to have on tort and insurance law



employed by their older, more traditional colleagues.<sup>34</sup>

Although I have my own appraisal of each of the various schools of legal thought that at present compete for the law teacher's mind, it is not my purpose to seek to convince you to adopt any of them. My object is, rather, to persuade you to examine these various approaches and then make reasoned decisions as to which of them or which part of them warrant your support. On the merits, I add only, first, that I find something of value in each of the various approaches — policy science, legal process, pragmatic instrumentalism, law and society, economic analysis, rights thesis, critical legal studies, feminism and literary theory — and, second, that in my judgment economic analysis, more than any other related discipline, has so invaded the law that all law teachers should become sufficiently informed concerning the subject as to be able to appraise the claims that its proponents advance.

## B. Utilization of the Subject Matters and Methodologies of Related Disciplines

Nearly forty years ago Brainerd Currie stated, "Every available resource of knowledge and judgment must be brought to the task of legal education . . . . [A]n understanding of the social structure in which law operates can no longer be taken for granted or regarded as irrelevant; law students — and hence law teachers — must somehow learn to take into account the contributions which other disciplines and sciences can make to the solution of social problems."<sup>35</sup> One might add that not only should law teachers assist students to explore the interdisciplinary world; they also have a responsibility to enlighten judges concerning other disciplines. The first duty involves the law teacher's training function; the second, the scholarship function; the two overlap.

In the decades since Currie wrote, legal education in general, some law schools in particular and a number of individual legal scholars have, in Currie's words, "somehow learn[ed] to take into account" interdisciplinary contributions. As I have suggested, this movement has been most pronounced in the field of economics. Whereas in the 1930's and 1940's the role of economics in law school teaching and research

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reform. Much of this scholarship is esoteric in method and vocabulary. . . . [I]n their quest to win, lawyers will not allow the strangeness of academic culture to deter them from using academic's insights."

34. See Getman, *Voices*, 66 TEX. L. REV. 577 (1988).

35. Currie, *The Materials of Law Study*, 3 J. LEGAL EDUC. 331, 334-35 (1951).



was, for the most part, limited to a subsidiary role in antitrust and public utilities, today economic analysis is employed in connection with many other subjects including such staples as torts, contracts, property, taxation, and corporations. Similarly, economic analysis is brought to bear on issues of crime control, race relations, judicial administration, securities regulation, environmental problems, and other areas of contemporary importance.<sup>36</sup> It thus appears that for the foreseeable future at least, economic analysis will be sufficiently significant and pervasive that it should be part of the scholarship arsenal of American law teachers.

Beyond economics and such traditional staples as history and philosophy, what other disciplines should be the concern of conscientious legal scholars? Clearly, law teachers cannot become informed concerning all knowledge. Choices have to be made. The question is how should those choices be made?

The most important factor of that choice derives from the circumstance that most American law teachers tend to concentrate their teaching and research endeavors on one or two subject matter areas. Accordingly, in selecting a related discipline to be studied, an individual law teacher presumably would seek enlightenment from the discipline or disciplines that most directly relate to the teacher's subject matter interests. Thus, the teacher of family law might well turn to sociology, the administrative law scholar to political science, and so on.<sup>37</sup>

Another related factor influencing choice very likely will be the background of the teacher in question. Legal scholars trained in a particular discipline — as increasingly in recent years many have — presumably would utilize the fruits of those undergraduate or graduate school experiences in their law school teaching and scholarship.

Making the initial selection of a related discipline to be studied

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36. R. POSNER, *ECONOMIC ANALYSIS OF LAW* xxi (2d ed. 1977).

37. Twenty-five years ago, I played a role in securing establishment of a joint committee by the Association of American Law Schools and the American Political Science Association consisting of five law teachers and five political scientists. The charge to the committee was to "consider the entire range of problems involved in promoting greater understanding and collaboration between teachers of political science and teachers of administrative law." AALS PROC. 34 (1961).

Alas, the committee was not a success. I think that the major reason for the committee's failure is that although the members were drawn from the two disciplines, the general approach of nearly all the members was the same; therefore there was no significant exchange of new or different ideas, and thus little synergistic enlightenment.

<https://nsworks.nova.edu/nlr/vol13/iss1/3>



thus should be relatively easy for the law teacher who seriously addresses the topic. Very likely the more difficult problems will be to determine which aspects of the related discipline should be given emphasis and whether there are additional relevant disciplinary fields that should be explored. Assistance in resolving these problems might be secured from knowledgeable (and cooperative) colleagues in other departments of the university.

Once the related non-law discipline has been selected and sufficiently mastered to justify utilizing its materials or methodology in a work of legal scholarship, other problems arise.

A related discipline can help solve a legal problem, but it alone cannot provide the solution. This is so because the law's domain is broader than that of the related discipline. The law is a means of social control. It considers many variables including fairness, equality, institutional competence, practical administrability, stability, likelihood of reliance, avoidance of retroactivity, public opinion, costs, benefits and so on. The task of the legal scholar is to exercise a critical and independent judgment in appraising and melding these uniquely legal factors along with the materials drawn from the other discipline. This responsibility cannot be delegated to the scholar in another field. Only the law teacher — the social science generalist and synthesizer, if you will — can perform this normative function. In our understandable aspiration to become interdisciplinary, we must never overlook or undervalue our unique legal role.

Related to this emphasis on not yielding our normative role to others is the importance of subjecting the interdisciplinary materials to a lawyer's "hard look" — to the kind of critical, even skeptical, analysis that we employ in appraising the work of our law-making and law-applying institutions: legislatures, courts and administrative agencies. We should never become so fascinated with the substantive and terminological esoterica of the related discipline that we forget or neglect our primary professional responsibility to seek to advance the cause of justice and decency in our complicated, interdependent society.

Too often, I am afraid, some interdisciplinists write at such a level of theoretical abstraction and the models they discuss are so abstruse that their discussions bears little relation to social reality and will have little or no real life effect. In expressing this caveat concerning abstraction and abstruseness, I am not arguing that there is no place for recondite interdisciplinary legal research and writing or that all research must be capable of reasonably prompt practical application. What I am concerned about is the risk that we legal scholars will shirk our respon-



sibility to translate or apply the external learning so that it can be used to advance the law's objective of achieving a just social order. Comprehensibility and practicability are desirable attributes for any research but they are particularly laudable goals for an interdisciplinary enterprise.

Similarly, humility and lack of pretension or arrogance are pleasing characteristics for any kind of scholarship, whether doctrinal or interdisciplinary. I suggest, however, that there is special need for cultivating these qualities in interdisciplinary research. The reason is that typically we know less about, and are less at home in, the social scientist's world than in the lawyer's world of process and doctrine. In a word, as interdisciplinists, we have more about which to be humble.

Finally, a word should be said concerning what Harry Wellington has termed the "two cultures" phenomenon in American law schools.<sup>38</sup> One culture is nourished by traditional, mainstream law professors, the other by an ever-increasing number of "more academically oriented" law teachers who "today care more about intellectual movements in faculties of arts and sciences than they used to [and who] care less about the activities of the bar and, perhaps, even the output of the bench."<sup>39</sup> This latter group, Wellington says, not only have different interests, "they talk differently from practicing lawyers. In the Sterling Law Buildings and elsewhere one hears heated conversations about hermeneutics, externalities and deconstruction."<sup>40</sup> An exemplar of the in-

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38. Wellington, *supra* note 33, at 327. Others also have commented on this phenomenon. See, e.g., Lupu, *Intergenerationalism and Constitutional Law*, 85 MICH. L. REV. 1390, 1395-96 (1987).

39. Wellington, *supra* note 33, at 327.

Few things are clear about legal education, but there is at least one feature of our noble calling that is a truth universally acknowledged. As a group, law teachers today are more academically oriented than they were 25 to 30 years ago. The converse of this truth is that they are less professionally oriented. My colleagues today care more about intellectual movements in faculties of arts and sciences than they used to; they care less about the activities of the bar, and, perhaps, even the output of the bench.

40. *Id.* At another point Wellington says, "Too many very able academic lawyers who, for whatever reasons, do not venture outside the ivy-covered walls, scorn the practicing lawyer and his work (deprecate it) and look for rewards only from within the universities. This is an established phenomenon. It is now visible in a second generation of law teachers." *Id.* at 329.

This development in law schools may be part of a broader intellectual trend. Historian Gertrude Himmelfarb has pointed out:

In literature, literary critics no longer address themselves to books in ways



terdisciplinary approach is Wellington's Yale Law School colleague, George L. Priest, who has written:

I should like to address some implications of what I believe to be the most important development in legal scholarship of the past fifty years. Over this period, scholarship in the law, like scholarship in other intellectual fields, has undergone a tremendous specialization of interest. The direction this specialization has taken, however, is sharply different from the one that might have been expected fifty years ago. In 1930, prior to the realist revolution, future specialization in legal scholarship might have suggested increasingly detailed and narrow treatises addressing traditional legal subjects. Today, authorship of the legal treatise has been cast off to practitioners. The treatise is no longer even a credit to those competing on the leading edge of legal thought. Instead, legal scholarship has become specialized according to the separate social sciences. . . .

. . . If these intellectual trends continue — as I believe they will — the structure of the law school will change. The law school will of necessity become itself a university. The law school will be comprised of a set of miniature graduate departments in the various disciplines. Introductory courses may be retained (if not shunted to colleagues). Even then, a wedge deeper than the one we see today will be driven between those faculty members with pretensions of scholarship and those without. The ambitious scholars on law-school faculties will insist on teaching subjects of increasingly narrow scope. The law-school curriculum will come to consist of graduate courses in applied economics, social theory, and political science.<sup>41</sup>

It may be that a few elite schools with exceptionally able student bodies and with sufficient resources to maintain a highly favorable faculty-student ratio will conform to Professor Priest's model. But except possibly for those institutions, I do not believe that Professor Priest

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that are meaningful or illuminating to ordinary readers. The same thing has happened in philosophy and other humanistic disciplines. A history is being written that is no longer accessible to the intelligent layman. . . .

That kind of professionalization of academia has very large consequences for the culture. The culture is left rootless, it no longer has professionals it can look to for guidance."

N.Y. Times, Jan. 4, 1988, § 4, at 1, col. 3.

41. Priest, *Social Science Theory and Legal Education: The Law School and the University*, 33 J. LEGAL EDUC. 437, 441 (1983).



will prove to be an accurate prophet. I think that in the future, as in the past, change should, and will, be incremental and that, also as in the past, no one of the various competing visions of law and legal education — in this case a theoretical version of the law and society vision — will preempt the field. As Grant Gilmore said so well in his Storrs lecture, "[W]e will do well to be on our guard against all-purpose theoretical solutions to our problems."<sup>42</sup>

In his 1975-76 Annual Report, the Dean of the Yale Law School wrote that "[o]ne test of the success of a school is the topics its faculty select for investigation. In the fourth quarter of the twentieth century, for example, it would be a misuse of talent if Yale's commercial lawyers were spending much time on the American Law Institute's Restatement of Contracts, Second."<sup>43</sup>

I do not in any way challenge this statement. The Dean may well have been completely correct in his judgment about the wise allocation of faculty resources at Yale. But what may be appropriate or inappropriate at Yale — or at any other single institution — is not necessarily a proper standard for all law schools throughout the United States. Interdisciplinary legal theorists are useful members of the law teaching profession. So are those law teachers who engage in more traditional scholarship such as restating the law or writing legal treatises. However, as Francis A. Allen has written,

[I]n some parts of American legal education, particularly in schools of national reputation, a number of younger scholars are doing work in which the traditional legal materials — judicial opinions, legislation, administrative regulations, and the like — are relegated to positions of comparative unimportance if not eschewed altogether. In its extreme forms the tendency weakens legal scholarship's capacity for unique contributions to knowledge, and may imperil the successful performance of legal education's distinctive social obligations.<sup>44</sup>

I join with Allen in deploring this development. I urge you to pursue your own scholarly interests wherever they may lead; and if you decide to examine traditional subjects, do not, I repeat, do not, regard yourself as a second class citizen, but instead take pride in your effort to im-

42. G. GILMORE, *THE AGES OF AMERICAN LAW* 109 (1977).

43. Annual Report of the Dean of the Yale Law School to the President and Fellows of Yale University 4 (1975-76).

44. ALLEN, *supra* note 22, at 187.



prove the law. As Roger C. Cramton so well says, "If law professors do not perform this social function, who will do so?"<sup>45</sup>

### C. Responding to Bergin's Disease — The Teaching-Scholarship Tension

I confess at the outset that I have no magic prescription for treating this malady. Instead, I diffidently offer these less than earthshaking observations.

To a certain limited extent, there is no tension or conflict between teaching and scholarship because all of us have classes to prepare for and teach, examinations to draft and blue books to evaluate, moot courts to judge, student papers to supervise and so on. These are non-delegable teaching duties whose performance necessarily has priority over other academic responsibilities including research and publication. Of course, the fact that a teacher must meet a 9:00 a.m. class in Contracts does not tell us whether and to what extent the previous afternoon or evening should have been spent in preparing for that class or in scholarly endeavor. The fact that we must spend an irreducible minimum of time and effort in performing our teaching tasks thus is only a slight help in resolving the tension.

The two activities of teaching and scholarship need not be conflicting but can be mutually reinforcing. One's research can enrich one's teaching. Classroom dialogue can highlight problems that deserve scholarly examination. Similarly, when one reads books, law review articles, advance sheets and other legal or interdisciplinary materials, the

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45. See Cramton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1, 14 (1986): Scholarship, perhaps even more than other facets of human culture, is responsive to fashions. Current fads in legal scholarship favor types of scholarship, such as highly theoretical interdisciplinary work . . . that are very difficult to integrate with the teaching of law in a professional school. These and other current fads also have the unfortunate effect of calling on law teachers to perform difficult tasks for which they are ill-prepared. Traditional doctrinal scholarship had, and still has, considerable deficiencies, but at least lawyers had some comparative advantage in doing it. In addition, the doctrinal development was highly useful to the practicing profession and the judiciary, and blended fairly well with the day-by-day teaching activities of law professors. The ideas for reform that come out of critical and skilled evaluation of legal doctrine and legal institutions have a special kind of authenticity and are usually capable of social implementation. Finally, there is the lack of any alternative law reform mechanism: If law professors do not perform this social function, who will do so?



information and ideas thus secured may influence both classroom teaching and scholarly production.

Making due allowance, however, for the synergistic and overlapping relationship between teaching and scholarship, there still remains the basic problem of relative emphasis between those two activities. A possible approach to the problem might reflect the fact that some individuals are superb teachers, but less than outstanding scholars, whereas for others the order is reversed. Would it be appropriate for a teacher in the former category to decide to place greater emphasis on teaching than on research? If he did so, should he be criticized? My answers to these questions are that such a decision would be proper and should not be criticized. I hasten to add, however, that such a decision casts a huge burden on the decider. The burden is to face up to the decision and make sure that it is the product of reason and not the result of slothful avoidance of conscious decision making.

Despite evidence of a non-existent or meager publication record by many law professors,<sup>46</sup> I believe that only a small percentage of American law teachers is incapable of worthwhile scholarship. I believe also that we law teachers are morally bound to use a certain portion of our time and effort in scholarship. Why, then, the meager record?

A number of explanations might be advanced: total dedication to teaching and counseling students, time consuming law school and university committee assignments, personal illness, difficult family problems, public service activities and so on. But making due allowance for all these, the unhappy fact very likely is that simple laziness and irresponsibility accounts for the sad record of some law teachers. What can be done?

Stricter tenure standards and decanal and peer pressures might be helpful. But in the last analysis, the decision to or not to engage in scholarship is uniquely personal. Accordingly, the decision must be made by each of us in a conscientious and responsible manner. In doing so it is appropriate to bear in mind that although very few may be capable of the pioneering breakthrough, most of us are able to contribute constructively to the corpus of legal knowledge and also that doing so can be fun. Thus my solution to the Bergin's disease problem is much less explicit than that proposed by its discoverer, who concluded that "our academics and our Hessian-trainers [should be liberated] to

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46. See Swygert & Gozansky, *Senior Law Faculty Publication Study: Comparisons of Law School Productivity*, 35 J. LEGAL EDUC. 373 (1985).



be fully one or the other, for they cannot be both at once.”<sup>47</sup> My belief, on the contrary, is that except possibly in a few elite institutions, most law teachers will and should continue “to be both at once,” and, equally important, that most of us in the enterprise are morally bound to strive to contribute in both roles to the full extent of our abilities.

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47. Bergin, *supra* note 2, at 657.